In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 449

MOONEY AIRCRAFT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-11) is reported at 366 F. 2d 809. The supplemental decision and order of the National Labor Relations Board issued following a backpay proceeding are reported at 156 NLRB 326 (R. 51).[1]

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[1] "R." refers to Volumes I and III, Transcripts of Record filed with the Court; "Tr." refers to Volume II, the stenographic transcript of the hearings.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1967. The petition for a writ of certiorari was filed on August 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that an employee would have been promoted to a higher paying job had he not been discriminatorily discharged, and thus that his backpay award should take into account the higher rate for the period following the date of such probable promotion.

STATUTE INVOLVED

Section 10(c), the relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is as follows:

> Sec. 10 * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

STATEMENT

A. The Board's Findings and Conclusions

In *Mooney Aircraft, Inc.*, 142 NLRB 942, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging George E. Mays on August 10, 1962, because of his union activities. The Board's order required petitioner to "offer to George E. Mays immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges" and to "make George E. Mays whole for any loss of earnings he may have suffered because of the discrimination against him * * *." On October 21, 1964, the Court of Appeals for the Fifth Circuit enforced the Board's order. *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 337 F. 2d 605.

On November 27, 1964, shortly after the entry of the court's decree, petitioner reemployed Mays as a "Mechanic A" (R. 34; Tr. 80). Prior to the discriminatory discharge, Mays had worked as one of eight or nine Mechanics A in petitioner's Maintenance Department (Tr. 45). On August 3, 1964, approximately three and a half months prior to Mays' reinstatement, petitioner promoted two Mechanics A, Fritz and Stephens, to the two leadman positions in the department (R. 34; Tr. 390). The collective bargaining agreement in effect at the time of the promotions provided that: "In case of transfer, layoff, promotion, shift assignment or recalling employees temporarily laid off, greater length of service governs if ability and efficiency are equal" (R. 34; Tr. 325).

Mays not only had greater seniority than either Fritz or Stephens, but he had greater seniority than any other Mechanic A (R. 34; Tr. 366).

The Board instituted the instant proceeding pursuant to Section 102.52, *et seq.* of its Rules and Regulations (29 C.F.R. § 102.52), to determine the amount of back pay due Mays. The Board adopted the findings, conclusions, and recommendations of the Trial Examiner who heard the case, and found that Mays, on the basis of his seniority under the terms of the applicable collective bargaining contract, would have been entitled to promotion to leadman on August 4, 1964, but for the unlawful discharge. The Board also found that petitioner had discriminatorily failed to reinstate Mays as a leadman and that his back pay award should reflect the higher pay he would have received as a leadman (R. 51, 34, 36, 38). The relevant testimony credited by the Board as the basis of its findings may be summarized as follows:

Mays had the greatest seniority of any Mechanic A in petitioner's maintenance department, and petitioner did not dispute this factor. Mays, together with Foreman Cox, had taught employees how to weld (R. 34; Tr. 48, 314), and Mays had completed a blueprint-reading course and passed welding tests (R. 34-35; Tr. 72, 161-163, G.C. Ex. 3). Prior to his discharge Mays had done about half of the welding in the Department (R. 36; Tr. 48, 236-238). There was no evidence or suggestion by any supervisory personnel that Mays lacked technical ability (R. 34).

Petitioner's vice-president of engineering and manufacturing, Ralph Harmon, testified that Mays lacked

the necessary "initiative and leadership" for promotion to leadman and that Mays had limited ability because he had never trained anyone "completely" (R. 34; Tr. 264, 266, 386-388). However, Harmon repeatedly conceded that he seldom observed Mays closely (R. 34; Tr. 266, 382, 385, 402-403), and disclaimed personal knowledge of Mays' specific qualification for the leadman job (R. 34; Tr. 403). Petitioner pointed to no evidence that anyone in its employ, including Fritz and Stephens who were promoted to leadmen, ever completely trained any new employees, and no such evidence was offered. Although petitioner did stress the experience Fritz and Stephens had gained prior to their employment by petitioner, it is uncontradicted that Mays had actually been a leadman at a previous job (R. 35; G.C. Ex. 5).

Foreman Cox testified that Mays sometimes needed supervision and that he did not get along well with people (R. 35; Tr. 240-241; 245-246), while Production Superintendent Tonnessen testified, generally, that Mays was not as qualified as Fritz and Stephens for the leadman position (Tr. 225-227). However, Cox had commended Mays for doing a good job by himself when he was assigned to painting (R. 35; Tr. 246). Neither Cox nor Tonnessen testified "to any observed failure by Mays to measure up" (R. 35). And, as the court below observed (Pet. App. A, n, 3), their generalized disparagement of Mays' ability was discredited by both the examiner and the Board.

On the basis of the foregoing testimony the Board found that, had he not been discriminatorily dis-

charged, Mays would have been promoted to leadman on the basis of his seniority on August 4, 1964; the Board discounted as unpersuasive petitioner's efforts to show that Mays was not qualified for promotion or that he was less able or efficient than Fritz or Stephens (R. 34, 35).[2] As a result, the Board computed Mays' back pay up to that date at the rate of a Mechanic A and from then on at the rate he would have earned as a leadman (R. 36-37). On the basis of its findings that Mays would have been promoted to leadman and that the failure to reinstate him as a leadman would in itself be discriminatory, the Board also directed petitioner to effect the promotion (R. 38).

In calculating the amount of back pay due Mays, the Board, according to established procedure, deducted from Mays' gross back pay his interim earnings and made a further adjustment to reflect the number of days Mays would have been absent from work.[3] Applying such a formula, the Board concluded that Mays was entitled to net back pay totaling

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[2] Contrary to petitioner's assertion (Pet. 6), Mays did not admit that he was not qualified to do the work that Fritz does. Mays testified that, although he considered himself as qualified as Fritz and Stephens, he and Stephens were "not well up" on the more advanced electrical phase of maintenance (Tr. 104).

[3] Although the record discloses facts concerning Mays' absences during certain years, this evidence, as the Board noted, was introduced in connection with the issue of absenteeism as it affected back pay and not to show that Mays' absences from work were a reason for not promoting him (R. 35; Tr. 320-323).

$2,952.30, with interest and minus tax withholdings required by federal and State laws, and directed petitioner to reimburse Mays in that amount (R. 51, 38).

B. The Decision of the Court of Appeals

The court of appeals found there was "substantial evidence in the record from which the Board could conclude that Mays, by virtue of his seniority, in all probability would under the terms of the collective bargaining agreement have been promoted to leadman on August 4, 1964," and accordingly enforced the Board's order (Pet. App. A, 10-11).

ARGUMENT

Petitioner does not challenge the power of the Board in an appropriate case to order an employee reinstated with the benefit of a promotion to which he would have been entitled, under a collective bargaining agreement, if he had not been discriminatorily discharged. The sole question presented by the petition is whether the court of appeals properly held that substantial evidence supported the Board's finding that Mays was at least equally qualified for promotion to leadman and was entitled to the promotion on the basis of his greater seniority, in the absence of a showing that he would have been disqualified for some other reason. This factual question does not warrant further review (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503), and in any event, the record as summarized, *supra*, adequately supports the Board's finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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